

**U.S. Department of Labor**

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**Issue Date: 19 November 2007**

CASE NO. 2005-LHC-1842

OWCP NO. 04-36882

In the Matter of

D. S.  
Claimant

v.

CONSOLIDATION COAL COMPANY  
Employer

**APPEARANCES:**

Stephen P. Moschetta, Esq.  
For the Claimant

Jean. E. Novak, Esq.  
For the Employer

**DECISION AND ORDER - AWARDING BENEFITS**

This proceeding arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq* and the implementing regulations at 20 CFR Parts 701 and 702. A formal hearing was held on July 12, 2007 in Pittsburgh, PA. At the hearing Claimant's exhibits (CX) 13-38 and Employer's exhibits (EX) 14-34 were admitted into evidence. At a previous hearing the issue of jurisdiction under the Act was adjudicated and Claimant was found to satisfy the jurisdictional requirements in a subsequent decision and order. Both parties have filed timely post-hearing briefs in the present proceeding.

**STIPULATIONS**

The parties have stipulated and I find that claimant suffered a work-related injury on June 22, 1998 and that he is precluded by such injury from performing his last job with the employer.

## ISSUE

Whether Claimant is permanently and totally disabled because of his work-related injuries under § 908(a) of the Act.

### SUMMARY OF EVIDENCE

#### Hearing Testimony

Claimant was born on April 11, 1945, has a high school education, and was married to his present wife in 1997. (TR 10-11). Claimant's job at the time of injury was a preparation plant mechanic and it required heavy to very heavy labor. (TR 12). Claimant first underwent back surgery in 1981 and was subsequently operated on in 1989. He returned to his job duties after both surgeries. After his work related back injury of June 22, 1998 he was operated on by Dr. J. William Bookalter. (TR 14). Immediately after the injury Claimant was referred to Dr. Richard Hennessy and had physical therapy which did not relieve his pain. (TR 14). On July 17, 1998 he went to the emergency room at UPMC Passavant Hospital with excruciating back pain and Dr. Bookalter then performed surgery on his lower back. After the surgery he was referred to Dr. Esman who began physical therapy on his back. Dr. Esman prescribed a foot brace because of a dropped foot and he still wears that brace today. (TR 15-16).

In 2001, Claimant sought out the services of Dr. Cappellini, a chiropractor, because of pain in his lower back and right leg. Dr. Cappellini applied heating pads to Claimant's back. (TR 17). On August 6, 2001 claimant was taken to the hospital in an ambulance because he could not get out of bed and he stayed at the hospital for ten days. He was given nerve blocks at the hospital and subsequently received two more nerve blocks. (TR 18). Although the nerve blocks were helpful the pain later returned. (TR 19). Claimant began receiving benefits under the Pennsylvania workers' compensation statute and then filed a claim under the Act on May 26, 2004. The employer sent claimant to Dr. Stone and Dr. Vertosick and he was more recently examined by Dr. Mitchell and Dr. Reidy. He was presented with a series of jobs to apply for and he was interviewed but not hired at any of the jobs. (TR 20-21). Claimant officially retired on May 1, 2000 because of his back pain. (TR 21). He installed a Jacuzzi tub in his house to help relieve his back pain. (TR 22).

Claimant continues to have lower back pain which causes cramps in his back and numbness in his foot. (TR 22). When he feels the pain claimant must lie down and rest and he sleeps with a pillow between his legs or on the right side of his back. (TR 23). He can walk for no more than six or seven minutes before he has to sit down. (TR 23-24). Claimant can not stand still because the pain will start in his back and he sits in one position for no more than twenty five minutes before he has to change positions. (TR 24-25). Claimant walks up and down his driveway and does stretching exercises. (TR 25). He is unable to bend over and he needs his wife's help in putting on his shoes and socks and sometimes his pants. (TR 26). He is treated by Dr. Bookalter who prescribes Neurontin and Ultrim for his pain. (TR 28). The medications make him dizzy and drowsy and he is unable to think clearly. (TR 30). Claimant has problems sleeping because his legs cramp up and wake him out of a sound sleep. (TR 32). He can drive his car for only twenty to twenty five minutes before he has to change drivers. (TR 33). Because

of his injury, Claimant gave up fishing, golfing and drag racing with his son. (TR 35). He no longer mows his lawn or shovels snow. (TR 36-37). He can not lift more than ten pounds without feeling back pain. (TR 38). Claimant experiences back pain every day and it bothers him that his wife has to cut the grass and shovel the snow. (TR 40). He engages in minimal physical activity. (TR 40-41).

Claimant's wife testified that since his back surgery the couple has had to give up dancing and traveling. (TR 56). Claimant gets severe leg cramps while he is sleeping and he screams and "hollers" in pain. (TR 57). Claimant is short tempered and his memory and concentration are terrible. *Id.* The couple installed an intercom system so that Claimant can call his wife when she was next door in the hairdresser shop. (TR 60-61).

### Medical Evidence

In a July 12, 2000 report Dr. Rich Kozakiewicz assessed Claimant's back injury as S/P laminectomy and discectomy with chronic right L5 radiculopathy secondary to the L4-L5 disc extrusion. (CX 13). The examination did not demonstrate radicular deficits to support a residual functional impairment.

CX 16 is a series of letters by Dr. Bookwalter from December 5, 1998 to January 16, 2007. He referred to Claimant's L4-5 re-exploration laminectomy and discectomy and stated that Claimant is permanently disabled from his previous position as a heavy equipment operator. Dr. Bookwalter stated that Claimant's foot drop is essentially unchanged and that the pain has been completely resolved. He later refers to nerve blocks and medications he has prescribed for Claimant and on examination he stated that Claimant has a relatively full range of motion of his lumbar spine.

Dr. Judith Esman evaluated Claimant on October 12, 1998 and her impression was status post lumbar discectomy of an L4-5 disc extrusion with weakness in his right ankle. (DX 18). She recommended a plastic AFO (brace) with an ankle joint to help stabilize his ankle. Dr. Esman later observed that Claimant was doing well with his AFO but he would receive eight more sessions of therapy. He was discharged to a home exercise program and continued to wear the ankle brace. She observed that as of December 22, 1998 Claimant can do sedentary to light work. On April 26, 1999 she recommended that he continue to wear the ankle brace and that he is able to do light work and lifting up to 20 pounds. His status quo on July 26, 1999 was the same but on May 31, 2000 he had a flare up of his radicular symptoms and she prescribed medication. In the last note dated August 30, 2000, she referred to his herniated disc as L4- with right L5 radiculopathy and right foot drop and that he had chronic low back pain.

Dr. Charles Stone evaluated Claimant on August 17, 1999 (CX 20) and noted that he had residual low back and right lower extremity pain secondary to disc herniation at L4-5 and disc degeneration at L5-S1. He averred that Claimant is capable only of sedentary work and he must wear his brace for all ambulation. His disc extrusion was caused by his June 1998 injury at L4-5 and his disc degeneration at L5-S1 was aggravated by the injury. Dr. Stone stated that Claimant's prognosis for recovery was poor and that he would not recover from the surgery.

Dr. Frank Vertosick examined Claimant on April 27, 2000 and wrote that Claimant has a residual right foot drop and chronic leg pain secondary to a massive disc extrusion which occurred as a result of his 1998 work injury. (CX 21). He is allowed to work sedentary duty full time as long as he is allowed to change position every twenty to thirty minutes. Claimant has reached maximum medical improvement and further treatment would be of no benefit to him. He recommended that Claimant continue to take pain medication and that no further surgery is indicated. Claimant is able to bend at the waist occasionally but he is precluded from squatting, climbing, kneeling, crawling and the use of foot controls although he could frequently reach above his shoulder.

Claimant was referred to Dr. William Mitchell who examined him on October 12, 2006. (CX 28). In his report, Dr. Mitchell referred to Claimant's occupational history, the treatment for his back injury, and his symptoms of pain and limited movement. Dr. Mitchell stated that Claimant has a post-traumatic herniated disc at the L4-L5 level with compression of the adjacent nerve, and that he subsequently developed an associated paresis or foot drop of the right foot and ankle requiring an AFO brace. It was his opinion that Claimant had reached maximum medical improvement and that he is not capable of doing any work as sitting for more than fifteen to twenty minutes causes numbness his right leg, that he is not capable of standing or walking more than fifteen to twenty minutes at the most, and he would not be capable of lifting or carrying weights because of the pain in his back and right leg.

Dr. Edward D. Reidy evaluated Claimant and produced a report dated June 21, 2007. (EX 28). Dr. Reidy performed a thorough review of Claimant's health history and examined Claimant. His assessment was chronic low back pain with chronic right lower extremity radiculopathy. Claimant's chronic low back pain is multifactorial, contributed to by his pre-existing lumbar disc disease, pre-existing surgeries, and degenerative spine disease. Claimant's injury at L4-5 was related to his June 1998 work injury. His injury is also the cause of his chronic right leg radiculopathy and contributes to his chronic low back pain. Claimant is not a candidate for any surgical correction of his condition. Dr. Reidy opined that Claimant is employable, but would require modifications for light or medium duty work. Claimant has reached maximum medical improvement and his chronic low back pain and chronic right leg radiculopathy are permanent. The leg radiculopathy is the only diagnosis that can be solely attributed to his industrial accident. His use of Neurontin and Ultram are appropriate and a rehabilitation program would not achieve any success. Claimant was not malingering and his subjective symptoms correlated well with the diagnostic test results. Claimant is restricted to light or medium work and his prognosis for complete recovery is poor.

Dr. Mitchell examined Claimant again on June 19, 2007. (CX 29). He diagnosed post-traumatic herniated disc at L4-L5 with compression of adjacent nerve root, and a paresis or foot drop of the right foot and ankle requiring a brace. Dr. Mitchell again concluded that Claimant is incapable of any work because he can not sit for more than fifteen minutes or stand or walk more than fifteen to twenty minutes. Although he leads a sedentary life, pain flare-ups are inevitable.

## Vocational Evidence

An Earning Power Assessment was done by Maureen Patterson, a rehabilitation specialist, on September 24, 1999. (EX 27). She reviewed Claimant's medical history educational/vocational background and performed a wide variety of skill and aptitude tests on Claimant. Given Claimant's physical limitations, transferable skills, and past educational and vocational experience she identified jobs that she felt that he is capable of performing. They are security guard, pari-mutuel teller, telephone solicitor, night auditor, assembler of small products, greeter, and answering service operator. In a labor market survey, she identified specific job openings as a telemarketer, pari-mutual teller, and security guard that are available and which she felt that Claimant was capable of filling. Claimant apparently applied for each of these jobs but was not hired. Id at 14.

A vocational report was prepared by Jay Jarrell, a certified personnel consultant. (CX 30, CX 33). Dr. Jarrell reviewed Claimant's work history, medical history, and the report of Ms. Patterson. Dr. Jarrell observes that the failure of Claimant to be hired in any of the jobs found by Ms. Patterson is understandable since Claimant was limited to sedentary work which required no training or experience and further limited to work that would permit frequent changes of position to accommodate his back pain. He noted that Claimant is now sixty two years old and has the same pain and positional limitations that he had when Ms Paterson conducted her job survey. Given Claimant's occupational history, his age, his physical limitations, and his chronic pain Dr. Jarrell concluded that Claimant is not likely to find a job in Fayette County where he resides because of the high unemployment rate for disabled people in Fayette County. Dr. Jarrell further opined that Claimant is not employable in the labor market in the area in which he lives.

The employer arranged for a second Earning Power Assessment by Tina Pish on July 3, 2007. (EX 30) After reviewing records of the miner's occupational, medical and vocational history, Ms. Pish conducted a labor market survey in which she identified jobs of dietary aide, cashier, and sales associate and the mean hourly wages that she believed represented realistic job opportunities for Claimant. She observed that Dr. Esman limited Claimant to light duty, Dr. Stone limited him to sedentary jobs, Dr. Mitchell felt that Claimant is incapable of work at any level, and that Dr. Reidy stated that Claimant can do full time light work and part time medium work. Dr. Pish's search revealed that there were a number of part-time an entry level positions paying from \$108.75 to \$204.80 a week for which Claimant had a reasonable opportunity to be hired. She based her opinion on Dr. Reidy's opinion that Claimant can do full time light work to occasional medium work. She asserted that Claimant's labor market survey presents him with employment opportunities which appear to be physically and vocationally compatible and provides him with some earning capacity.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant has filed the instant claim asserting that he is now permanently and totally disabled. As Claimant has clearly reached maximum medical improvement, there is no doubt that his disability is now permanent. *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). Total disability is defined as complete incapacity to earn-pre-injury wages in the same

work as at the time of injury. To establish a *prima facie* case of total disability, the claimant must show that he can not return to his regular employment due to his work-related injury. As the employer readily concedes that Claimant is incapable of performing the heavy job he had at the time of his June 22, 1998 injury, it is clear that Claimant has established a *prima facie* case. If claimant establishes a *prima facie* case of total disability the burden shifts to the employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work history and physical restrictions, and which he could obtain if he diligently tried. See *Trans-State Dredging v. Benefits Review Bd (Turner)*, 731 F.2d 199, 16 BRBS 74 (CRT)(4<sup>th</sup> Cir. 1984), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981). The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical employment opportunities by identifying specific jobs available to the employee within the local community. *Turner, supra*. The administrative law judge may rely on the testimony of vocational counselors that specific job opportunities exist to establish the existence of suitable jobs. The vocational counselor must identify specific available jobs; job surveys are not enough. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRS 380, 384 (1983).

In her Earning Power Assessment of 1999, Ms. Patterson identified jobs in the area of Claimant's residence for which she felt that he could be hired. However, Claimant applied for all these positions in 1999 and was not hired. Therefore Ms. Patterson's assessment does not meet the Employer's burden of proof.

In 2007, Ms. Pish developed an Earning Power Assessment and identified positions which she felt were suitable for Claimant. Ms. Pish's assessment is initially flawed because she relied on Dr. Reidy's findings that Claimant is physically capable of doing full time light duty work and part time medium duty work. I do not find that Dr. Reidy's conclusions are credible in light of Claimant's very credible testimony that he could not sit, stand or walk for any appreciable length of time without experiencing excruciating pain. Dr. Reidy's assessment is also at odds with Dr. Mitchell's conclusion that Claimant cannot do any regular work, and in fact Dr. Reidy is the only physician in the record who stated that Claimant is capable of full time light work and part time medium duty work. Ms. Pish's Earning Power Assessment is therefore based on exaggeration of the work that Claimant can physically perform.

The jobs that Ms. Pish identified as suitable for Claimant, i.e., dietary aide, cashier, and sales associate, were not described in detail and there is no evidence of the physical requirements for each of these positions. Even without an exact description of the physical requirements of these jobs Claimant and his wife's very credible testimony prove beyond any doubt that Claimant is in such pain and discomfort throughout the day and night that he is physically incapable of holding any job, even sedentary ones, on a part time or full time basis. This conclusion is corroborated by Dr. Mitchell's well reasoned opinion that Claimant is physically incapable of doing any work. I firmly believe Claimant and his wife's testimony that it is an ordeal for him to get through the day and that he is in pain most of the time whether sitting, standing, walking or lying down. I find that the employer has failed to meet its burden of proof of finding jobs that Claimant can do given his physical restrictions and without even taking into account that he is sixty two years old, has a limited education, and his work history involved

mostly unskilled heavy work. Claimant is therefore permanently and totally disabled from doing any work and the employer must pay him at the full compensation rate. (The parties did not stipulate as to Claimant's average weekly wage at the time of his injury.)

ORDER

IT IS ORDERED THAT:

1. Employer shall pay Claimant compensation for total disability from the present and continuing indefinitely into the future;
2. Employer shall furnish Claimant with such reasonable, appropriate, and necessary medical care and treatment as his work-related injury requires.
3. Employer is entitled to a credit for all compensation payments it has made to Claimant pursuant to Pennsylvania's workman's compensation statute.

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DANIEL L. LELAND  
Administrative Law Judge